Filed 8/17/09 Shokrian v. Pacific Specialty Ins. Co. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AMIR SHOKRIAN, Plaintiff and Appellant, v. PACIFIC SPECIALTY INSURANCE COMPANY, Defendant and Respondent.	B208274 (Los Angeles County Super. Ct. No. SC091080)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

Stephen H. Krumm for Plaintiff and Appellant.

Weisierski & Zurek LLP, David M. Phillips and Kevin Campbell for Defendant and Respondent.

In the underlying action, the trial court granted summary judgment on appellant Amir Shokrian's claims for breach of insurance contract and bad faith against Pacific Specialty Insurance Company (Pacific). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts: Shokrian is in the business of buying and managing real property.[1] In December 2004, Shokrian bought property in Venice occupied by two residential units. The former owner, Herbert Rio, lived in one of these units, located at 322 Fourth Avenue (the 322 unit); Rio's tenants lived in the remaining unit, located at at 322 ½ Fourth Avenue (the 322 ½ unit). After the purchase, Rio and his tenants continued to reside on the property. Shokrian never had written rental agreements regarding the units, and he received no rental payments from anyone living on the property.

After purchasing the property, Shokrian applied in January 2005 for a policy of homeowner's insurance from Pacific. The application forms contained the following question: "15. Is the dwelling presently occupied? If not occupied, risk prohibited." Shokrian answered the question by checking the accompanying box marked "Yes." The forms also asked: "16. If dwelling is tenant occupied, is tenant current with rent payment? If no, risk prohibited . . . ." Shokrian answered the question by checking the accompanying box marked "Yes."

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[1] In opposing summary judgment, Shokrian purported to raise triable issues of fact on some matters solely on the basis of evidentiary objections to Pacific's showing. As he failed to seek rulings on these objections, he has waived them. (Code Civ. Proc., § 473c, subd. (d).) We therefore view the facts in question as undisputed for purposes of our analysis.

Shokrian executed the application on January 13, 2005. Pacific issued a policy to Shokrian, effective for a one-year period beginning January 14, 2005.

In September 2005, Shokrian submitted a claim under the policy for damage to the units due to vandalism. After taking Shokrian's recorded statement, Pacific rescinded the policy. As grounds for the rescission, Pacific pointed to Shokrian's answers to questions 15 and 16 on his application.

Shokrian initiated the underlying action against Pacific in September 2006. His complaint alleged that the property had been vandalized by the prior tenants or other parties. On January 9, 2008, Pacific filed its motion for summary judgment or adjudication, contending that there was no triable issue that it properly rescinded the policy on the basis of Shokrian's mispresentations in his application. On March 20, 2008, the trial court granted summary judgment and entered judgment against Shokrian.

DISCUSSION

Shokrian contends that summary judgment was improperly granted. We disagree.

A. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) "'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the

moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact.[2] (*Ibid*.)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Furthermore, in moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element *X*." (*Id*. at p. 853, fn. omitted.)

Here, the parties do not dispute that Shokrian's claims for breach of insurance contract and bad faith fail if Pacific properly rescinded the policy.[3] We therefore examine whether there are triable issues regarding the propriety of the rescission.

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[2] Although we apply the same test as the trial court, we limit our inquiry into Shokrian's claims to the contentions addressed in his opening brief. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126 [even though review of summary judgment is de novo, review is limited to issues adequately raised in appellant's brief].)

[3] The record that Shokrian has provided to us omits his complaint.

B. *Governing Principles*

In rescinding the policy, Pacific relied on the following policy provision: "Misrepresentation and Fraud[:] If the insured has concealed any material fact or circumstance concerning this insurance, . . . this insurance shall become void and all claims hereunder shall be forfeited." In addition, Pacific stated that the rescission was authorized under several provisions of the Insurance Code, including sections 331 and 359, which govern the right to rescind an insurance policy for concealment or misrepresentation.[4] Section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." Section 359 provides: "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."[5]

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[4] All further statutory citations are to the Insurance Code, unless otherwise indicated.

[5] In addition to these provisions, Pacific relied on sections 330, 332, 334, 358 through 360, and 650.

Section 330 states: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

Section 332 states: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."

Section 334 states: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

(Footnote continues on next page.)

"[S]ections 331 and 359 are part of a larger statutory framework that imposes 'heavy burdens of disclosure' upon both parties to a contract of insurance, and any material misrepresentation or the failure, whether intentional or unintentional, to provide requested information permits rescission of the policy by the injured party.' [Citation.] . . . [¶] Requiring full disclosure at the inception of the insurance contract and granting a statutory right to rescind based on concealment or material misrepresentation at that time safeguard the parties' freedom to contract. '[An insurance company] has the unquestioned right to select those whom it will insure and to rely upon him who would be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting its risks.' [Citation.]" (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 468-469 (*Mitchell*).)

As our Supreme Court explained in *Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 915-916 (*Thompson*), for purposes of "appraising a claim of misrepresentation in procuring insurance," misrepresentation and concealment of material facts "are grounds for rescission of the policy, and an actual intent to deceive need not be shown. [Citations.]" Nonetheless, in some circumstances, the

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Section 358 states: "A representation is false when the facts fail to correspond with its assertions or stipulations."

Section 360 states: "The materiality of a representation is determined by the same rule as the materiality of a concealment."

Section 650 states: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

applicant's state of mind may obviate the basis for rescission: "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. [Citations.]" (*Id*. at p. 916.)

Under these principles, "[c]ourts have applied [] sections 331 and 359 to permit rescission of an insurance policy based on an insured's negligent or inadvertent failure to disclose a material fact in the application for insurance [citations] . . . . One authority has noted that under [] sections 331 and 359, 'misstatement or concealment of "material" facts is ground for rescission *even if unintentional.* The insurer need not prove that the applicant-insured actually intended to deceive the insurer.' [Citation.]" (*Mitchell, supra*, 127 Cal.App.4th at p. 469.)

The court in *Thompson* further explained that in the context of an application for insurance, the materiality of a misrepresentation "is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. [Citations.] The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law. [Citations.]" (*Thompson*, *supra,* 9 Cal.3d at p. 916.) In contrast, "'[a]n incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer. [Citations.]'" (*Id*. at p. 916, quoting *Ransom v. Penn Mutual Life Ins. Co.* (1954) 43 Cal.2d 420, 427.)

Thus, materiality is assessed by reference to the misrepresentation's effects on the insurer in question: "The test for materiality is whether the information would have caused the underwriter to reject the application, charge a higher

premium, or amend the policy terms, had the underwriter known the true facts. [Citations.] 'This is a *subjective* test; the critical question is the effect truthful answers would have had on [the insurer], not on some "average reasonable" insurer.'" (*Mitchell*, *supra*, 127 Cal.App.4th at p. 474, quoting *Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 181.)

C. *Parties' Showings*

In seeking summary judgment, Pacific relied primarily on Shokrian's recorded statement before Pacific's investigator and his deposition. Shokrian's recorded statement, dated October 25, 2005, contains the following dialogue:

"[Investigator]: Okay. Did you purchase this property with tenants in it?

"[Shokrian]: Yes. [¶] . . . [¶]

"[Investigator]: . . . You did not know the tenants?

"[Shokrian]: No, I didn't know the tenants.

"[Investigator]: How much were you receiving in rent?

"[Shokrian]: I was not receiving anything from them for rent.

"[Investigator]: Did you ever try to contact them to get rent?

"[Shokrian]: I tried to, yeah. I tried to go there once, one or two or three times, and somehow they just frightened me and I just didn't want to face them anymore." Shokrian further explained that he had evicted the tenants in late 2005.

Shokrian's deposition occurred on September 11, 2007. According to the excerpts submitted by Pacific, Shokrian testified that he intended to rent the units on the property. Regarding the 322 unit, Shokrian testified that Rio was living on the property, and that he never received rent from Rio.

Regarding the 322 1/2 unit, Shokrian testified as follows:

"Q. Was anyone living [in the 322 ½ unit]?

"A. Yes.

"Q. Who was living [in the 322 ½ unit]?

"A. I don't know the name right now. I would say some gang member probably. I don't know."

When Shokrian was examined regarding his answers to questions 15 and 16 on his application, he testified as follows:

"Q. . . . As of January 2005 when [the application was executed], did you know whether there were tenants occupying the units . . . ?

"A. I don't know.

"Q. In January of 2005 were you aware that no one was current on their rent payments?

"A. How would I know that?

"Q. Well, as the purchaser of the property.

"A. How would I know? I purchase the property, how would I know if they were paying rent to the ex-owner or not? How would I know?

"Q. Did you ask the ex-owner?

"A. No."

According to Shokrian, he first discovered the occupants in the 322 ½ unit in March or April 2005, when Rio moved out. Shokrian asked the occupants to pay rent, but they did not do so.

Shokrian's evidentiary showing in opposition to summary judgment consisted solely of his declaration, dated March 4, 2008. The declaration stated in pertinent part: "3. On or about December 2004, I entered into escrow to purchase [the property]. . . . Prior to closing escrow, I briefly inspected the property and after closing escrow, it was my intention to remodel the property. I did discuss with the escrow officer prior to close of escrow that if [] Rio wished to remain at

the property after close of escrow, that he would pay me $3,000 per month rent and enter into a rental or lease agreement after closing. [¶] 4. . . . At the time of the [insurance] application, it was my understanding that [] Rio and his extended family occupied the property. I was not specifically aware that one of the two cottages . . . was occupied by tenants other than [] Rio or his family. I was not provided any information or made aware by [] Rio prior to closing escrow that [] Rio leased one of the cottages to tenants who were unrelated to him. If in fact one of the cottages was leased by [] Rio, I was unaware prior to closing escrow that [] Rio's tenants were in any way delinquent on rent payments to him. . . . [T]he information I had concerning the property at the time of application was limited. . . . On the date of application, I responded affirmatively to the question of whether the property was occupied and affirmatively that rent was current because [] Rio occupied the property and I had no reason to think that either he or other occupants were not current with rent. I also had made it clear that going forward, [] Rio would pay monthly rent and [] I would receive rent after the property closed escrow. [¶] 5. At the time I submitted the application, I answered the questions with the information which I understood or believed to be true based on my discussions with [] Rio and knowledge of the fact that the property was occupied. After closing escrow, some months later, I learned that [] Rio had leased one of the cottages to tenants who were delinquent in their rental payments. I initiated unlawful detainer proceedings against those tenants, and at considerable expense, eventually evicted them."

D. *Analysis*

We conclude that summary judgment was properly granted. At the beginning of our analysis, we observe that a party opposing summary judgment

may not create a triable issue by submitting a declaration that is at odds with the witness's deposition testimony. (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.) We therefore disregard Shokrian's declaration to the extent it contradicts his deposition testimony. As explained below, the remaining evidence establishes that Shokrian's application, executed after he purchased the property, contained material misrepresentations sufficient to support rescission.

We find guidance on the propriety of summary judgment from *Mitchell, supra*, 127 Cal.App.4th 457. There, the plaintiff bought a warehouse and submitted an application for fire insurance that contained several misrepresentations. (*Id*. at p. 457.) The application misstated the size and financial worth of the building; asserted that the plaintiff used the warehouse for his own music business, although it was leased to a person in the garment trade; falsely described the building as in compliance with fire code regulations; asserted that it had a burglar alarm, when it had none; and denied that it was covered by an insurance policy, although it was insured by the California FAIR plan, an insurer of "'last resort.'" (*Id.* at p. 464.) After a fire occurred in the building and the plaintiff submitted a claim, the insurer rescinded the policy on the basis of the misrepresentations. (*Id*. at pp. 464-465.)

When the plaintiff sued for breach of the policy and bad faith, the insurer sought summary judgment, contending that it had properly rescinded the policy. (*Mitchell*, *supra*, 127 Cal.App.4th at pp. 465-466.) In opposing summary judgment, the plaintiff admitted that the application contained incorrect information, but asserted that any such inaccuracies were unintentional and immaterial. (*Id*. at pp. 473-474.) In support of this contention, the plaintiff submitted a declaration stating that he had intended to use the warehouse for his

music business, and that he did not know that the warehouse contained uncorrected code violations.[6] (*Id*. at p. 466.)

The appellate court affirmed the grant of summary judgment in the insurer's favor, reasoning that the evidence unequivocally established that the misrepresentations on the application were material, as they "went directly to questions of insurability, risk, and premium," and the plaintiff had acknowledged that they might have affected the insurer's decision to issue the policy. (*Mitchell*, *supra*, 127 Cal.App.4th at pp. 475-476.) The court also concluded that sections 331 and 359 permitted the insurer to rescind the policy due to the material misrepresentations, even if they were "negligent or unintentional." (127 Cal.App.4th at p. 473.)

Here, Shokrian testified in his deposition that Rio, the former owner, and other persons lived in the units after he bought the property, and that he never received rent from Rio or any other resident. In addition, he admitted in his declaration (1) that when he completed the application, he had no agreement with Rio about Rio's obligations to pay rent, and (2) that Rio had leased the 322 ½ unit, whose tenants never paid Rio or Shokrian any rent. Shokrian's affirmative answer to question 16 -- that the units' tenants were current in their rent -- was therefore false. Although Shokrian -- unlike the plaintiff in *Mitchell* -- has never acknowledged that his answers to the questions may have affected the issuance of the policy, his answers can only be regarded as material to Pacific, as the

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[6] The plaintiff also presented a declaration from an expert, who opined that the plaintiff's misrepresentations were not material to the insurer. (*Mitchell*, *supra*, 127 Cal.App.4th at p. 466.) In granting summary judgment, the trial court excluded the expert's declaration, reasoning that the expert was incompetent to testify regarding the materiality of facts to the insurer. (*Ibid*.)

application expressly asserted that negative answers to the questions would classify the risk as "prohibited."[7] Nothing before us suggests that the answers were not material to *Pacific*. In view of *Mitchell*, rescission of the policy was proper, regardless of whether Shokrian's misrepresentations were negligent or unintentional.

Shokrian contends that his declaration raises triable issues about materiality. According to the declaration, Shokrian intended to enter into a written rental agreement with Rio when Shokrian completed the policy application in January 2005. Shokrian points to the declaration as evidence that he executed the application in "anticipat[ion of] the creation of a landlord-tenant relationship with a permissive hold-over prior owner," and argues that this fact, "'if known, would not have made the contract less desirable to [Pacific]'" (*Thompson*, *supra,* 9 Cal. 3d at p. 916). We disagree.

Shokrian's answers on the application were significantly misleading insofar as they stated that Rio was "current with [his] rent payment[s]." There is no evidence in the record that Pacific would have issued a policy had it known the "'true facts'" (*Thompson*, *supra*, 9 Cal. 3d at p. 916), namely, that Rio occupied the 322 unit without a rental agreement, although Shokrian hoped to reach an agreement with him in the future. The same conclusion is true of the misrepresentations concerning the 322 ½ unit: nothing before us suggests that

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[7] Shokrian suggests that materiality here is properly determined by an objective test specified in *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, rather than the subjective test described in *Mitchell*. However, as the court explained in *Cummings*, the test it discusses is inapplicable to the rescission of policies under section 330 et seq. (*Cummings*, *supra*, 202 Cal.App.3d at p. 1414, fn. 7.)

Pacific would have issued the policy had it known that tenants paying no rent were occupying that unit. Shokrian's declaration thus fails to raise a triable issue regarding materiality.

Shokrian also contends that his declaration raises triable issues regarding the application of what he calls the "innocence" rule stated in *Thompson.* According to the declaration, Rio did not tell Shokrian about the tenants in 322 ½ unit after Shokrian bought the property, and Shokrian completed the application "with the information which [he] understood or believed to be true based on [his] discussions with [] Rio and knowledge of the fact that the property was occupied." Shokrian thus argues that his misrepresentations do not support rescission because in completing the application, he had "no present knowledge of the facts sought," and "failed to appreciate the significance of information related to him" (*Thompson*, *supra*, 9 Cal. 3d at p. 916).[8]

In our view, the rule upon which Shokrian relies is inapplicable here. The rule originated within the context of applications for health and life insurance. (*Life Ins. Co. of North America v. Capps* (9th Cir. 1981) 660 F.2d 392, 394.) As our Supreme Court has explained, "failure of an applicant to disclose a physical condition of which he is ignorant will not affect the policy [citation,] and a layman might reasonably be excused if, in disclosing information, he failed to understand

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[8] On a related matter, Shokrian attributes responsibility for the misrepresentations to Pacific, arguing that the application forms were ambiguous, as they provided him no way to clarify Rio's status. However, we will not engage in strained or tortured interpretation of an application "to fabricate an ambiguity where none existed." (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 820, quoting *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 469.) Here, the application forms expressly invited Shokrian to provide "Remark[s] on [a] separate sheet if necessary," but he did not do so.

the meaning of certain medical terms and for that reason omitted some fact in his medical history." (*Cohen v. Penn Mut. Life Ins. Co.* (1957) 48 Cal.2d 720, 726.) The rationale for the rule is that because lay persons lack "the level of knowledge or understanding" possessed by doctors or other experts, "[i]t would be 'patently unfair' to allow the insurer to avoid its obligations under the policy on the basis of information that the applicant did not know, or alternatively, did not fully understand." (*Miller v. Republic National Life Ins. Co.* (9th Cir. 1986) 789 F.2d 1136, 1340.)

The rule is subject to at least two qualifications. First, the rule is ordinarily inapplicable to persons capable of appreciating the significance of the misrepresented or omitted facts. (*Cohen v. Penn Mut. Life Ins. Co.*, *supra*, 48 Cal.2d at p. 726.) Second, the applicant, in misrepresenting or omitting material facts, must act in good faith. (*Jefferson Etc. Life Ins. Co. v. Anderson* (1965) 236 Cal.App.2d 905, 909-910 ["Where an applicant for insurance is asked whether he has suffered from or been suspected of having a specific ailment, his answer in the negative, although contrary to fact, if the result of ignorance and made in good faith, is not a ground for avoidance of the policy.]; *Miller v. Republic National Life Ins. Co.*, *supra*, 789 F.2d at p. 1340 [layman "had a duty to disclose only those changes in his health that he, acting in good faith, believed were material"].)

Here, the evidence established that Shokrian is in the business of buying and managing real property. He owned the property at the time he filled out the application. He knew that Rio was occupying the property in the absence of any rental agreement. Moreover, Shokrian acknowledged in his deposition that he completed the application without determining whether there were other tenants on the property and, if so, whether they were paying rent. Shokrian nonetheless affirmed that all tenants in the units were current on their rent. He thus

misrepresented what he knew about Rio's status, and otherwise made the affirmations knowing that he had not inquired about the existence of other tenants on his own property.

As Shokrian buys and manages real property as a profession, his misrepresentations cannot be attributed to an inability to appreciate the significance of Rio's status or his own alleged ignorance about the property's occupants. Moreover, under the circumstances, his affirmative representations do not demonstrate good faith. To the extent Shokrian's declaration attempts to raise a triable issue about his good faith by suggesting that Rio improperly withheld pertinent information, the declaration must be disregarded, as Shokrian's deposition discloses that he never sought the information from Rio. Accordingly, summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.